



## FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions, effective August 2016.

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### ADOPTED

The Committee has adopted amended instructions, M Crim JI 12.2, 12.3 and 12.5, for use in cases where the defendant is charged with controlled substances violations under MCL 333.7401 and 333.7403. The amendments correct the final element in each instruction and remove repetitive language.

#### **[AMENDED] M Crim JI 12.2 Unlawful Delivery of a Controlled Substance**

(1) The defendant is charged with the crime of illegally delivering [(*state weight*) of a mixture containing] a controlled substance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant delivered [*identify controlled substance*].

(3) Second, that the defendant knew that [he / she] delivered a controlled substance.

[(4) Third, that the controlled substance that the defendant delivered [was in a mixture that] weighed (*state weight*).]<sup>1</sup>

[(5) [Third / Fourth], that the defendant was not legally authorized to deliver this substance.]<sup>2</sup>

[(6) “Delivery” means that the defendant transferred or attempted to transfer the substance to another person, knowing that it was a controlled substance and intending to transfer it to that person. [An attempt has two elements. First, the defendant must have intended to deliver the substance to someone else. Second, the defendant must have taken some action toward delivering the substance, but failed to complete the delivery. It is not enough to prove that the defendant made preparations for delivering the substance. Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it had not been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime the defendant is charged with attempting and not some other goal.]]<sup>3</sup>

### Use Note

Because the statutory definition of delivery includes actual, constructive, or attempted transfer of a substance, attempted delivery is not a lesser included offense. MCL 333.7105(1).

<sup>1</sup> This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

<sup>2</sup> This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to deliver the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).

<sup>3</sup> Use bracketed material defining attempt only in cases involving act falling short of completed delivery. Any attempt is a specific intent crime. *People v Joeseype Johnson*, 407 Mich 196, 239, 284 NW2d 718 (1979) (opinion of Levin, J.).

*McFadden v United States*, 576 US \_\_\_\_; 135 S Ct 2298 (2015), held that a prosecutor need not prove that the defendant intended to deliver any particular controlled substance, only that he or she intended to deliver some controlled substance.

### History

M Crim JI 12.2 (formerly CJI2d 12.2) was CJI 12:2:00, 12:2:01, 12:2:03; amended October, 1993; amended August, 2016.

### Reference Guide

#### Statutes

MCL 333.7401, .7105(1), .7214(a)(iv).

#### Case Law

*People v Mass*, 464 Mich 615, 628 NW2d 540 (2001); *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994); *People v Steele*, 429 Mich 13, 26 n10, 412 NW2d 206 (1987); *People v Joeseype Johnson*, 407 Mich 196, 239, 284 NW2d 718 (1979); *People v Delgado*, 404 Mich 76, 86, 273 NW2d 395 (1978); *People v Collins*, 298 Mich App 458, 828 NW2d 392 (2012); *People v Maleski*, 220 Mich App 518, 522, 560 NW2d 71 (1996); *People v Brown*, 163 Mich App 273, 413 NW2d 766 (1987); *People v Tate*, 134 Mich App 682, 352 NW2d 297 (1984); *People v Williams*, 54 Mich App 448, 450, 221 NW2d 204 (1974).

*McFadden v United States*, 576 US \_\_\_\_; 135 S Ct 2298 (2015).

## **[AMENDED] M Crim JI 12.3 Unlawful Possession of a Controlled Substance with Intent to Deliver**

(1) The defendant is charged with the crime of illegally possessing with intent to deliver [*state weight*] of a [mixture containing a] controlled substance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed<sup>1</sup> [*identify controlled substance*].

- (3) Second, that the defendant knew that [he / she] possessed a controlled substance.
- (4) Third, that the defendant intended to deliver the controlled substance to someone else.
- (5) Fourth, that the controlled substance that the defendant intended to deliver [was in a mixture that] weighed (*state weight*).<sup>2</sup>
- [(6) Fifth, that the defendant was not legally authorized to deliver the controlled substance.]<sup>3</sup>

#### *Use Note*

<sup>1</sup> For a definition of possession, see M Crim JI 12.7.

<sup>2</sup> This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

<sup>3</sup> This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to deliver the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).

*McFadden v United States*, 576 US \_\_\_\_; 135 S Ct 2298 (2015), held that a prosecutor need not prove that the defendant intended to deliver any particular controlled substance, only that he or she intended to deliver some controlled substance.

#### *History*

M Crim JI 12.3 (formerly CJI2d 12.3) was CJI 12:2:00, 12:2:01, 12:2:04; amended August, 2016.

#### *Reference Guide*

##### Statutes

MCL 333.7401,.7105(1), .7214(a)(iv).

##### Case Law

*People v Konrad*, 449 Mich 263, 273, 536 NW2d 517 (1995); *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994); *People v Wolfe*, 440 Mich 508, 519-520, 489 NW2d 748 (1992); *People v Allen*, 390 Mich 383, 212 NW2d 21 (1973); *People v Harper*, 365 Mich 494, 506-507, 113 NW2d 808, 813-814 (1962); cert den, 371 US 930 (1962); *Peterson v Oceana Circuit Judge*, 243 Mich 215, 219 NW2d 934 (1928); *People v Germaine*, 234 Mich 623, 627, 208 NW 705, 706 (1926); *People v Johnson*, 68 Mich App 697, 243 NW2d 715 (1976). *McFadden v United States*, 576 US \_\_\_\_; 135 S Ct 2298 (2015).

### **[AMENDED] M Crim JI 12.5 Unlawful Possession of a Controlled Substance**

(1) The defendant is charged with the crime of knowingly or intentionally possessing [(*state weight*) of a mixture containing] the controlled substance, [*identify controlled substance*]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed<sup>1</sup> [*identify controlled substance*].

(3) Second, that the defendant knew that [he / she] possessed a controlled substance.

[(4) Third, that the substance that the defendant possessed [was in a mixture that weighed (*state weight*).]<sup>2</sup>

[(5) [Third / Fourth], that the substance was not obtained by a valid prescription given to the defendant.]<sup>3</sup>

[(6) [Third / Fourth / Fifth], that the defendant was not otherwise authorized to possess this substance.]<sup>4</sup>

#### *Use Note*

<sup>1</sup> For a definition of possession, see M Crim JI 12.7.

<sup>2</sup> This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

<sup>3</sup> This paragraph should be given only if some evidence has been presented that the defendant had a valid prescription for the substance. See *People v Little*, 87 Mich App 50, 54-55, 273 NW2d 583 (1978), and Use Note 4 below.

<sup>4</sup> This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).

*McFadden v United States*, 576 US \_\_\_\_; 135 S Ct 2298 (2015), held that a prosecutor need not prove that the defendant intended to deliver any particular controlled substance, only that he or she intended to deliver some controlled substance.

#### *History*

M Crim JI 12.5 (formerly CJI2d 12.5) was CJI 12:3:00-12:3:01; amended October, 1993; amended August, 2016.

#### *Reference Guide*

##### Statutes

MCL 333.7403, .7214(a)(iv), .26424, .26427, .26428.